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108-12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~328.~~ 62

JOHN GRAY, APPELLANT,

vs.

AMOS HOWE AND ANN SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 13, 1879.

whereas *but one person*—presumably Otis Bigelow—appealed in this case.

2. The bond is approved by "the judge of the Supreme Court of the District of Columbia sitting in Equity," holding a special term of said court for equity business, (Rec. 49,) and not by a justice who had power to *allow an appeal or writ of error*. (Anson *vs.* R. R., 23 How., 1.) The decree appealed from was rendered by the court in general term; the case was there and in the jurisdiction of that court for all purposes; that court could retain the case and refuse to allow an appeal if it had good reason for so doing, and any proceeding to compel such an allowance in case of a refusal would have to be addressed to that court, and that one only. The case had been taken from the Equity Court—the court in special term—and the jurisdiction of that court, for any and all purposes, ceased when it was taken to the court in general term.

C. H. ARMES,
For appellee.

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INDEX.

	Original.	Print.
Caption	1	1
Statement of the case	3	1
Statement of the parties: Amos Howe	4	2
Ann Smith	4	2
John Gray	5	2
Proceedings in probate court	6	3
Testimony of Ann Smith	6	3
Wm. S. Walker	8	4
P. Lynch	9	5
Findings of probate court	10	5
Notice of appeal from probate court to district court	11	6
Motion to dismiss appeal	11	6
Rulings on this motion	11	6
Trial in district court	12	6
Three exceptions	12	7
Deeds given in evidence	14	8
Recognizance	15	9
Judgment of the district court on recognizance	16	9
Findings of court requested	16	9
Findings of district court	17	10
Exceptions to findings	18	10
Judgment of the court	18	11
Notice of motion to vacate the findings and for a new trial	19	11
Motion for a new trial	21	12
Order in said motion	21	12
Undertaking on appeal	21	13
Notice given on appeal	23	14
Certificate of clerk	23	14
PROCEEDINGS IN SUPREME COURT.		
Continuance	25	15
Hearing	26	15
Decree	27	15
Opinion	29	16
Appeal allowed	35	17
Bond	37	18
Affidavit of value	40	19
Clerk's certificate	41	19
Stipulation of counsel waiving clerk's signature to certificate	42	20

1 Be it remembered that on the 24th day of October, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Utah a transcript of the record and proceedings in and of the district court of the third judicial district of said Territory, in a certain matter of the claim for a deed for the east half of lot three, in block 104, plat A, Salt Lake City survey, between John Gray, claimant, and Amos Howe and Ann Smith, contestants, theretofore pending in said district court, of which said transcript and endorsements thereon the following is a copy, to wit:

2 In the supreme court of the Territory of Utah, January term, 1877.

IN THE MATTER OF THE CLAIM FOR A DEED for the east half of lot three, in block one hundred and four, plat A, Salt Lake City survey, between John Gray, claimant,
and
AMOS HOWE AND ANN SMITH, CONTESTANTS.

TRANSCRIPT ON APPEAL.

Filed in my office this 24th day of October, A. D. 1876.
E. T. SPRAGUE,
Clerk Supreme Court, Utah Territory.

3 TERRITORY OF UTAH,
Salt Lake County:

Third judicial district court, October term, 1875.

IN THE MATTER OF THE CLAIM FOR A DEED for the east half of lot three, block one hundred and four, plat A, Salt Lake City survey, between John Gray, claimant,
and
AMOS HOWE AND ANN SMITH, CONTESTANTS.

Statement of the case to be used on a motion for a new trial in the district court, with a stipulation between the counsel of the parties hereto, that either party may use the same on appeal to the supreme court of the Territory after the decision of the district court on the motion for a new trial, only adding thereto the notice of the motion, the motion, and the action of said district court on said motion.

The land in controversy is a part of Salt Lake City survey, being the east half of lot three, block one hundred and four, plat A, of said city in Salt Lake County. It was declared upon by Daniel H. Wells, mayor of said city, on the 4th day of November, 1871, pursuant to the act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2d, 1867, and pursuant to the act of the governor and legislative assembly of the Territory of Utah, approved February 11, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2d, 1867."

That the notice required by the act last aforesaid, section two, was given November 27th, 1871, to claimants to file with the probate
4 court their "statements." And a patent was issued by the United States, January 1st, 1872, to said Daniel H. Wells, as provided by law, for said land among other lands.

Statement of the parties' claims, with the date of their filings.

AMOS HOWE.

Amos Howe filed in the office of the probate court of Salt Lake County in this Territory, on the 11th day of December, 1873, a statement duly entitled and signed by counsel.

[Title.]

I, Amos Howe, do hereby claim to be the rightful occupant and lawful owner of possession of the following described tract or parcel of land being and situate in said county, to wit: Commencing two rods west of the southeast corner of lot three; thence north twenty rods; thence west three rods and five feet; thence south twenty rods; thence east three rods and five feet to the place of beginning; in block 104, plat A, in the city of Salt Lake, Territory of Utah, containing sixty-six square rods, more or less, and ask to be adjudged that I may become possessed of the same in fee-simple; which interest I hereby claim as of right pursuant to the act, etc. (referring to the acts aforesaid).

(Signed) AMOS HOWE,
By SNOW & HOGE,
His Counsel.

Ann Smith's claim.—Filed December 16th, 1871, in said probate court.

[Title.]

The undersigned, the lawful owner of possession of the following piece or parcel of land, to wit, being 2 rods south front by 20 rods north, off of the east side of the east half of lot three in block 104,
5 plat A, Salt Lake City survey, claims to be entitled to a deed in fee-simple in accordance with the act, etc. (referring to said acts).

(Signed) ANN SMITH.

John Gray's claim.—Filed April 16th, 1872, in said probate court.

[Title.]

The undersigned, John Gray, at present a resident of the State of Nevada, hereby claims to be the owner and entitled to the possession of the following-described premises, situate in the corporate limits of Salt Lake City, Utah Territory, to wit, the whole of lot three (3) in block one hundred and four (104), plat "A," of the survey of said city; and the undersigned hereby claims to be entitled to a deed in fee-simple for said lot, with all the improvements, rights, privileges, and appurtenances therewith connected and in any wise belonging thereto, and does hereby make application for a deed thereto.

(Signed) JOHN GRAY,
By R. N. BASKIN,
Attorney in Fact.

Afterward, on the 3d day of September, 1872, said probate court issued a summons to the said John Gray, Amos Howe, and Ann Smith, to appear before said probate court, at the court-house in said county, on the 14th day of September, 1872, to make proof of said claim, which said summons was duly served and returned; and on the 14th day of September, 1872, the parties by themselves and their counsel appeared in court.

6 *Proceedings in the probate court.*

RECORD.

[Title.]

September 14th, 1872, 10 o'clock a. m. Case called; parties present; notices returned served.

R. N. Baskin, counsel for John Gray, asked leave to amend his application so as to relinquish his right, title, and interest to the west half of the above-mentioned lot, which was granted.

Ann Smith asked leave to file an affidavit, and that the same be made a part of the record herein, which was granted.

Case continued until September 22d at 2 p. m.

Testimony of Ann Smith.—Taken before the judge of probate September 14th, and filed same day.

Ann Smith, upon being duly sworn, saith upon her oath that in the year 1864 she purchased from George Nebeker, who was then in the possession thereof, a part of lot three in block one hundred and four, plat "A," Salt Lake City survey, to wit, two rods in width, south front, by twenty rods in length, north and south, off the east side of said lot, for the sum of two hundred and fifty dollars, two hundred dollars of which purchase-money was paid down, and the balance of fifty dollars was paid shortly thereafter; that at the time of the purchase of said described premises her son-in-law, Joseph Arnold, was living with this affiant; and that subsequently, to wit, on the 8th day of May, 1865, without the knowledge or consent of deponent, who was sick at the time, the said Joseph Arnold, through misrepresentation, obtained a transfer or deed from the said George Nebeker to him, the said Joseph Arnold, to the said piece or parcel of land, which was a fraud on this affiant, as the money paid to the said Nebeker for the said premises was the money of this affiant, and the deed of transfer should have been made to her therefor.

7 Affiant further saith that she has been in the possession of said piece or parcel of land, thus purchased from the said Nebeker, during the past eight years, and is now the rightful claimant, owner, and possessor thereof.

(Signed) her ANN + SMITH. mark.

Jurat.

RECORD.

SEPTEMBER 22—2 p. m.

Parties present. By agreement, the evidence on the part of John Gray was first taken up.

Counsel for John Gray asked leave to introduce in evidence that part of the records of Salt Lake County known as sheet five (5), showing that John Gray was the original owner of lot number three (3), in block number one hundred and four (104), plat "A," Salt Lake City survey.

Counsel for Ann Smith and Amos Howe admitted sheet 5 to be the original entries of Salt Lake City survey; also that the said John Gray was in possession and occupation of said lot up to March, 1863.

Counsel for John Gray here rested.

Counsel for Ann Smith and Amos Howe offered in evidence the recognizance taken before Hon. John F. Kinney, judge of the third judicial district court of the Territory of Utah, June, 1862, and recorded upon the records of said court, page 217, wherein John Gray is named as one of the recognizers; also the records of said court March 13th, 1863, page 247, wherein said recognizance was declared forfeited.

(The introduction of this last evidence objected to by counsel for John Gray, on the grounds of it being irrelevant, uncertain, and indefinite. Objection overruled; to which counsel for John Gray excepted.)

8 Counsel for Ann Smith and Amos Howe introduced county records for Salt Lake County, Book C, page 90, being records of marshal's deeds.

(Objected to by counsel for Gray; no foundation having been laid for the introduction of said record showing that execution ever issued against John Gray; also because the record does not show that the east half of lot three (3), in block one hundred and four (104), was ever sold or conveyed by the Territorial marshal, and the record was therefore irrelevant and immaterial. Objection sustained.)

Counsel for Ann Smith and Amos Howe offered in evidence records of recorder of Salt Lake County, Book C, page 91; conveyance from Thomas Ellerbeck to Russel K. Homer; also Book C, page 126, of said records, conveyance from Russell K. Homer to George Nebeker; also Book C, page 310, same records, conveyance from George Nebeker to Amos Howe; and Book C, page 310, same records, conveyance from George Nebeker to Arnold.

Counsel for Amos Howe and Ann Smith here asked for further time for the introduction of witnesses.

By consent case continued until October 2d at 2 p. m.

Deposition of William S. Walker.

[Title and oath.]

OCTOBER 2.

William S. Walker says he is the clerk of the third judicial district court for the Territory of Utah; that he has been the clerk of said court since July, 1870; that he has made due and dilligent search among the papers and archives of the clerk's office of said court, for the purpose of finding an execution alleged to have been issued in March, 1863, in the case wherein the people of the United States in the Territory of Utah were plaintiffs, and Peter L. McCue, John Gray, and others were defendants, and has been unable to find such execution or any record or memorandum of it to be found in my office, and I am confident that no such writ is on file in my office; if it had been, I should have found it. I made this search at the request of R. N. Baskin, esq., attorney for Mr. Gray. This search was made about fifteen or eighteen months ago, and said writ has not been placed on file since.

(Signed) WM. S. WALKER.

Jurat.

9 *Patrick Lynch.*

[Title and oath.]

Patrick Lynch says he was clerk of the third judicial district court for the Territory of Utah from the year 1861 to 1869, inclusive. That whilst incumbent of said office, I furnished Z. Snow, esq., the accompanying papers, being copies of proceedings in the above-entitled district court, and that they are true and correct copies from the originals then on file in my office. The first being a copy of a recognizance taken before Hon. John F. Kinney, June 18th, 1862, entered into by Peter McCue et al.; the second being a forfeiture of said recognizance and judgment thereon; and the third being the execution by me issued on said judgment on the 14th day of March, A. D. 1863, and the return thereon.

I know all these to be true, full, and correct copies because I compared them at the time I gave Mr. Snow the copies. I do not remember the date when I furnished these copies to Mr. Snow, but it was a certain time when suit was pending between Abram Taylor vs. Joseph A. Thompson, in the third district court of which I was then clerk.

(Signed) PATRICK LYNCH.

Jurat.

Affidavit of Ann Smith.

Ann Smith, being duly sworn, deposes and says that in the year 1865 Joseph Arnold, affiant's son-in-law, who was then living with her, purchased from George Nebeker, who was then in possession thereof, two rods in width off the east side of lot three, in block one hundred and four, plat A, Salt Lake City survey, for the use of this affiant, he, the said Arnold, acting as her agent; the amount paid to the said Nebeker for said premises was two hundred and fifty dollars, and which was paid in property, and later most of which was paid by her, and she expected to receive a transfer from said Nebeker for said premises; but the said Arnold, who acted for affiant in the purchase of said premises, had the transfer from Nebeker made to him instead of to affiant. That shortly after the said premises were purchased from
10 the said Nebeker, the said Arnold's wife, affiant's daughter, departed this life, leaving two children, the youngest of which was only about two years old. That after the death of the said Arnold's wife, he, the said Arnold, continued to reside with affiant, off and on, for about one year and a half, when he finally went away, leaving one of the children (the other, the younger, having previously died in the custody of affiant) without making any provision for its support and maintenance, and has not since returned, neither has he done anything for the support of his said child from that time to the present, and affiant has been at the whole expense of taking and supporting the same. Deponent further saith that the said Arnold, although the transfer from the said Nebeker was made to him instead of affiant as it should have been made, has not during the last seven years made any claim to said premises, and affiant has been in the undisputed possession thereof, and has dwelt thereon up to the present time, and should now be adjudged the rightful owner thereof.

(Signed) her ANN + SMITH. mark.

Jurat, dated Jan. 29th, 1874.

Findings of the probate court and judgment found and filed, February 2d, 1874.

[Title.]

This case came up for hearing in the probate court for Salt Lake County, Territory of Utah, upon the several applications on file herein. Having been adjourned from time to time for the introduction of testimony, the case was finally submitted, and upon investigation thereof, the evidence adduced and allegations of the parties, the court finds the following, to wit:

That Amos Howe is the rightful owner of the following-de-
11 scribed piece or parcel of land, to wit, commencing at a point two rods west from the southeast corner of said lot 3, block 104, plat "A," and running thence north 20 rods; thence west 3 rods 1 foot 8½ inches; thence south 20 rods, to a point 3 rods 5 feet 8½ inches west of the place of beginning; thence east to the place of beginning. That Ann Smith is the rightful owner of the following-described piece or parcel of land, to wit, commencing at the southeast corner of said lot, thence north 20 rods; thence west 2 rods; thence south 20 rods; thence east 2 rods to the place of beginning. That said John Gray is not the rightful owner of the land claimed and described in his application, Nos. 3191 and 3026.

It is further ordered that a certificate of title issue in accordance herewith.

Dated Feb. 2d, 1874.

E. SMITH,
Judge of said Court.

Afterward, on the 8th day of January, notice of appeal in this matter by the said John Gray was filed in the probate court, which was followed by service on Ann Smith and Amos Howe's attorneys, and in due time an undertaking on appeal was filed, all of which was sufficient in form and in substance. And afterward, January 27th, 1875, the case was docketed in this court.

Thereupon, afterward, on the 9th day of February, 1875, the said Amos Howe and Ann Smith filed a motion in this court to dismiss the appeal, which motion was as follows, viz:

[Title.]

Now comes Ann Smith and Amos Howe, by Snow & Hoge, their attorneys, and moves the court to dismiss this case for want of appellate jurisdiction in this court, and for the reason that at the time the appeal herein was supposed to have been taken there was no law authorizing an appeal in this case.

SNOW & HOGE,
Attorneys for Ann Smith & Amos Howe.

Afterwards, on the 11th day of October, 1875, the court over-
12 ruled said motion, and the said Ann Smith and said Amos Howe, by their counsel, then and there excepted to said overruling.

This case came on for trial before the court, the trial before the jury being waived on the 26th of October, 1875, when the three following

exceptions to the rulings of the court were taken by the counsel for Amos Howe, which exceptions were each respectively signed and sealed by the court and ordered to be made a part of the record in this matter.

EXCEPTION I.

[Title.]

Be it remembered that on the trial of this case before the court on the 26th day of October, 1875, Amos Howe, by his counsel, to maintain the issue on his part, presented himself as a witness, and offered to prove by himself that he, the said Amos Howe, on the 8th day of May, 1865, after receiving a deed of conveyance from George Nebeker of that part of said lot by him claimed, entered into the possession thereof, and that he had continuously, from the said 8th day of May, been in the actual occupancy of the same up to the present time, and has made valuable improvements thereon.

To this the said John Gray, by his counsel, objected on the ground that it did not appear by the transcript sent up to the court that said testimony was given at the hearing in this matter in the probate court, and the court sustained said objection and would not permit said evidence to be given. To this ruling the said Howe then and there excepted.

EXCEPTION II.

Afterward the said Amos Howe offered to prove by the said Howe, to be followed by other witnesses, that in the probate court of said county, on the 22d day of September, 1872, when the testimony was being taken in this matter in said court, he offered himself as a witness, and offered to prove by himself that on the 8th day of May, 1865, after receiving a deed of conveyance from George Nebeker of the land claimed by him in this matter, entered into the possession of the same, and had continued in such possession up to the said 22d day of September,
1872, and made valuable improvements thereon, but that at that
13 time before said court, the said John Gray, by his counsel, admitted that such were the facts, and for that reason said testimony was not given in ssid probate court. To which the said John Gray by his counsel objected, on the ground that it did not affirmatively appear by the transcript sent up, that this was the fact, and that such in fact was not the case. And the court sustained said objection, and would not permit said testimony to be given. To which said Amos Howe, by his counsel, then and there excepted.

EXCEPTION III.

The said Amos Howe then presented upon the stand as a witness on his part one Elias Smith, and offered to prove by him that at the time of making out the transcript in this case to be presented to this court the copy of an execution referred to in Patrick Lynch's testimony was not among the papers in the clerk's office of the probate court, and for that reason the said copy was not included in the transcript in this case; and that he, as deputy clerk of the probate court, had made due and diligent search for the same at the instance of the counsel for Amos Howe, but that it could not be found.

That his object in introducing said testimony was to follow it with other testimony showing its loss, and showing that an execution issued on the 14th day of March, 1863, on the judgment of this court entered on the 13th day of March, 1863, and levied on the property now in dispute as the property of John Gray, and that said property had been sold by virtue of said execution to Thomas Ellerbeck, as stated in the deed of John D. T. McAllister to Thomas Ellerbeck.

To which the said John Gray, by his counsel, objected, on the ground as alleged that it did not affirmatively appear that said copy was offered in evidence in the probate court. And the court sustained said objection and would not permit said testimony to be given.

To which the said Amos Howe, by his counsel, then and there excepted.

There was then given in evidence the following deeds of conveyance:

14 1. A deed of conveyance executed in due form by George Nebeker to Amos Howe, on the 8th day of May, 1865, conveying to him so much of the land in contest, with the improvements thereon, as is claimed by Howe, for the consideration expressed in the deed of fifteen hundred dollars.

2. A deed of conveyance executed in due form by George Nebeker to Joseph Arnold, on the 8th day of May, 1865, conveying to him so much of the land in contest, with the improvements thereon, as is claimed by Ann Smith, for the consideration of expressed in the deed of two hundred and fifty dollars.

3. A deed of conveyance executed in due form by Russel K. Homer to George Nebeker, on the 12th day of March, 1864, conveying to him the land in contest for the consideration expressed in the deed of five hundrnd dollars.

4. A deed of conveyance executed in due form by Thomas Ellerbeck to Russel K. Homer, on the 11th day of November, 1863, conveying to him the land in dispute, with the improvements, for the consideration expressed in the deed of one thousand dollars.

5. A deed of conveyance executed in due form by John D. T. McAllister, Territorial marshal, to Thomas Ellerbeck, on the 11th day of April, 1863. This deed recited that by a writ of execution to the said marshal directed, bearing date the 14th day of March, 1863, from the third judicial district court of Utah Territory, he was commanded that of the goods and chattels lands and tenements, of Peter McCue (here follows the names of about ninety persons among was the said John Gray), he should cause to be levied the sum of thirty-four thousand five hundred dollars, being the amount of a judgment rendered by said court on a forfeiture of a recognizance, in pursuance whereof he, the said marshal, levied on certain property, as made a matter of record in his return on said writ, and having given due and legal notice of the time and place of sale, did, on the 11th day of April, 1863, amongst other things then and there offered for sale, sell to Thomas Ellerbeck, for the sum of three hundred and fifty dollars, he being the highest bidder, and the best price bidden, the following-named property

15 levied upon as the property of John Gray, to wit, one adobie house, situate in the 17th ward, Great Salt Lake City, together with all the improvements, rights, and appurtenances as in any wise belonging and appertaining to the east half (more or less) of lot three (3), block one hundred and four (104), plat A, Great Salt Lake City survey. Then follows the cooveying clause to him the said Thomas Ellerbeck, in due form, and to his heirs and assigns.

This last-mentioned deed was given in testimony subject to the opinion of the court as to its competency.

There was then given in evidence the following, which appears of record in this court:

A recognizance entered into June 18th, 1862, entered in the journals of this court.

Third judicial district, Territory of Utah, Great Salt Lake County. In chambers, June 18th, 1862, 10.15 a. m.

Come, now, Peter McCue (here follows the names of about ninety persons, among whom is the name of John Gray, the present claimant, and the twenty-three other names mentioned in the judgment of this court, March 13th, 1863, as being absent), and acknowledged themselves to owe and be indebted to the people of the Territory of Utah, jointly and severally, each for the other, in the sum of fifteen hundred dollars each ($1,500), to be levied of their and each of their goods and chattels, land and tenements, if default shall be made in the following condition, to wit: "The condition of this recognizance is such that if the said parties as aforesaid shall and do appear before the court on the second Monday in March next, then and there to answer such charges as may be brought against them by the grand jury for said court, and then and there to abide the judgment of said court, and not depart without leave of court, then this obligation shall be void.

(Signed) J. F. KINNEY, *Judge.*

16 And the judgment of this court, entered March 13th, 1863, on said recognizance as follows, viz:

Judgment of the district court.—Entered March 13th, 1863.

The names of the parties recognized in the affairs of the South Weber difficulties on the 18th day of June last being called, and the following-named persons, to wit, Peter McCue (here follows the names of twenty-two persons) "not answering to their names, it is ordered by the court that their recognizances are hereby forfeited, amounting, according to the tenor thereof, at fifteen hundred dollars each, to the sum of thirty-four thousand five hundred dollars ($34,500)," whereupon it was ordered and adjudged by the court that the said defendants, Peter McCue (here follows the names of the recognizers, in all about ninety, among whom was John Gray, the present claimant), as sureties, pay to the Territory of Utah the said sum of thirty-four thousand five hundred dollars ($34,500) and costs of suit, and that execution issue therefor.

[Signature of the judge.]

The foregoing, including the transcript sent up to this court, constituted all the evidence in the case, and also all of the records and proceedings of the third district court relating to the judicial recognizances above referred to.

The said Amos Howe and Ann Smith, by their counsel, requested the court to find the following facts, viz:

1. That the judgment of the district court, entered March 13th, 1863, was a valid judgment.

2. That an execution was issued on said judgment under the date of March 14th, 1863, directed to John D. T. McAllister, who was then Territorial marshal, by virtue of which he, the said marshal, levied on the property now in contest as the property of John Gray, and sold the same to Thomas Ellerbeck as stated in the deed to him dated April 11th, 1863, and that there were conveyances duly executed, commencing with Ellerbeck, and extending to the said Howe and Ann Smith, she, the said Ann Smith, having it by a resulting trust; and that Thomas Ellerbeck and his grantees had been in the peaceable possession thereof continuously since 1863.

17 And as a conclusion of law they requested the court to find that a valid judgment, execution, levy, and sale is all that is necessary to protect a purchaser on execution, and that Amos Howe is entitled to a deed of so much of the land as is claimed by him, and that Ann Smith is entitled to a deed of so much of the land as is claimed by her.

But the court found—

Findings of the district court.—Filed October 30th, 1875.

[Title.]

The court finds the following facts:

John Gray was in the peaceable possession of the property until 1863, when he was forcibly ousted by John D. T. McAllister, and the said McAllister conveyed the property to Thomas Ellerbeck. That the other claimants thereto claimed under said McAllister through said Ellerbeck, and Ellerbeck or those to whom he transferred have had continuous possession thereof since 1863 and still have said possession.

That said John Gray and others were in 1863 held in recognizance in the third district court to appear therein and answer any indictment which the grand jury might find against them. That a forfeiture of said recognizance was taken before any action of the grand jury, and that the grand jury afterward did act and find an indictment which the defendants answered, and upon which they were tried, found guilty, sentenced, and then by the governor, S. S. Harding, pardoned.

That as conclusions of law the court finds—

That the forfeiture of the recognizance was premature and void for want of jurisdiction of the parties by the court.

That the court could only forfeit said recognizance after indictment found and failure of defendants to answer thereto.

That said Gray was forcibly, unlawfully, and wrongfully ousted, and a trespasser can gain no advantage by unlawful acts.

J. S. BOREMAN, *Judge*.

18 *Exceptions to the findings of the court.—Filed October 30th*, 1875.

[Title.]

The said Amos Howe and Ann Smith except to so much of the findings of facts by the court as finds the following, viz:

That in 1863 John Gray was forcibly, unlawfully, and wrongfully ousted from the possession of said lot by John D. T. McAllister.

That the forfeiture of the recognizance was taken in this court before any indictment was found in said court against John Gray, and that an indictment was afterward found against him upon which he was

tried, convicted, and pardoned by the governor, the same being contrary to the evidence of the case.

The said Amos Howe and Ann Smith also excepted to the failure to find as facts as requested by them, viz:

That there were conveyances by deeds duly executed of said land, commencing with John D. T. McAllister, Territorial marshal, through sundry persons, terminating in Amos Howe and Ann Smith.

The said Amos Howe and Ann Smith also except to the conclusions of law of said court for the reasons—

That the judgment of the district court entered on the 13th day of March, 1863, in the case of The People of the United States in the Territory of Utah against John Gray and others, on said recognizance, is only voidable, not void, as found by the court; and that by the law the said Amos Howe and Ann Smith being, severally, in the possession of so much of said lot as is claimed by them respectively, and having been so in the possession as found by the court since May 8th, 1865, they, not the said John Gray, are the persons entitled to a deed from the mayor.

[Signatures.]

Judgment of the court.

[Title.]

This case having been called at this term in its proper order,
19 each of the parties being present by their respective attorneys, was tried by the court without a jury and submitted for deliberation and decision; and after due consideration the court declared its decision and finding in writing, which having been duly filed it is considered by the court that by the reason of the law and the findings aforesaid that said John Gray is entitled to a deed from the mayor of said city for the premises filed on and claimed by him, and hereinafter described. It is therefore ordered and adjudged by the court that the mayor of Salt Lake City, Utah Territory, by deed duly executed and delivered in pursuance of the town-site act of said Territory, convey in fee-simple to the said John Gray, the lawful and rightful claimant to the east half of lot 3, block 104, plat "A," Salt Lake City survey, situate in the county of Salt Lake and Territory of Utah, and that the said John Gray have and recover of the respondent his costs in this behalf expended, taxed to $

To which ruling of the court the respondents excepted.

The said Amos Howe and Ann Smith specifically rely on each and every error both of fact and of law set forth in the notice of the motion to be made in this matter filed on the 9th day of November, 1875.

Z. SNOW,
Attorney for Contestants.

Filed in court November 17th, 1875. Ed. B. McKean, clerk.

I acknowledge service of a copy of this statement November 17, 1875, after it was filed in court.

(Signed) R. N. BASKIN,
Attorney for John Gray.

[Title of case.]

The above-named John Gray and his counsel will take notice that the above-named Ann Smith and Amos Howe will move the court to

vacate the findings of fact by the court and its decision herein filed on the 30th of October, 1875, and for a new trial, for the following causes materially affecting the substantial rights of them, the said Ann Smith and Amos Howe:

1. The insufficiency of the evidence to justify findings of facts.
2. The decision is against the evidence and contrary to law.
3. The court erred in overruling the motion to dismiss the appeal in this matter.

4. The court erred in holding that no evidence could be introduced on the trial in this matter except the evidence given in the probate court, and therefore erred in refusing to permit the said Amos Howe to prove that he went into possession of so much of the said lot as is claimed by him, on the 8th day of May, 1865, and that he continued therein from that date till the present time, and that he has made valuable improvements thereon.

5. Or if the court did not err as in item 4, of this notice, then the court erred in not permitting the said Amos Howe to prove that he, on the trial in the court below, offered to make said proof, and the facts were admitted by the counsel of the said John Gray, and for that reason such proof was not there made.

6. The court erred in not permitting the said Amos Howe to prove and show the loss of the copy of an execution issued on March 14th, 1863, offered in the testimony of Patrick Lynch, and in not permitting him to show the contents of said execution by parol.

7. That by law, a purchaser by virtue of an execution, and those claiming under him, are freely protected on showing a judgment of a court of competent jurisdiction against the judgment debtor, an execution issued thereon, and a levy and sale. Irregularities in any of them do not affect him.

8. The persons in possession of the property at the time the mayor declared upon the land, bona fide claiming title thereto, are the persons to whom the deed must be given. Any latent equities therein must be settled in a court of equity after the legal title passes.

Z. SNOW,
Attorney for Smith and Howe.

(Indorsed:) Filed and served Nov. 9th, 1875.

TERRITORY OF UTAH,
Salt Lake County:

District court, third judicial district.

IN THE MATTER OF THE CONTEST FOR A DEED of a part of lot 3, block 104, plat "A," Salt Lake City survey, between John Gray, claimant,
and
AMOS HOWE AND ANN SMITH, CONTESTANTS.

Now come Amos Howe and Ann Smith and move the court to vacate the findings of fact by the court, and the judgment of the court thereon entered October 30th, 1875, in this case, and to grant a new trial for the reasons assigned in the notice of this motion filed on *the* November 9th, 1875; which see.

Z. SNOW,
Attorney for Ann Smith and Amos Howe.

At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 17th day of August, 1876. Present, the Hon. M. Schaeffer, judge of the third judicial district.

JOHN GRAY ET AL.
vs.
AMOS HOWE ET AL.

This cause coming to be heard on the motion for a new trial herein, after argument by the attorneys for the respective parties, and the court being duly advised, it is ordered that said motion be and the same is hereby overruled; to which ruling the respondents, by counsel, then and there excepted.

I, C. S. Hill, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 17th day of October, 1876.

[L. S.] C. S. HILL, *Clerk.*

22 TERRITORY OF UTAH,
Salt Lake County, ss:

Third judicial district court, Hon. M. Schaeffer, judge.

IN THE MATTER OF A CONTEST FOR A DEED OF a part of lot number three, in block one hundred and four, plat "A," Salt Lake City survey, between John Gray, claimant,
and
AMOS HOWE AND ANN SMITH, CONTESTANTS.

Whereas the said Amos Howe and Ann Smith are about to appeal to the supreme court of the Territory of Utah from the decision of the district court of the third judicial district of said Territory, entered in the above-entitled action on the 30th day of October, 1875, and from the decision of the said district court overruling their motion for a new trial in said action, entered on the 17th day of August, 1876, and from all of the proceedings in said district court in said action:

Now, therefore, we, John F. Miller, of Salt Lake City, in the county of Salt Lake and Territory of Utah, and Albert W. Davis, of the same place, in consideration of the premises, and of such appeal, undertake and promise in behalf of said Amos Howe and Ann Smith that said appellants will pay all damages and costs which may be awarded against them on the appeal not exceeding one hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

JOHN F. MILLER,
ALBERT W. DAVIS.

TERRITORY OF UTAH,
County of Salt Lake, ss:

On this 4th day of October, 1876, before me, C. S. Hill, clerk of the district court of the third judicial district within and for the Territory

of Utah, personally appeared John F. Miller and Albert W. Davis, at the clerk's office of said court, who were each by me sworn in due form of law, and each upon his oath said, that is to say, the said John F. Miller says that he is a resident of Salt Lake City, and Salt Lake County, in said Territory, and is one of the sureties in the foregoing undertaking, and his occupation is a machinist; and the said A. W. Davis says that he is also one of the sureties in said under-
23 taking, that he resides in the city and county of Salt Lake, and is a machinist; and each says he is worth more than the amount specified in the foregoing undertaking, over and above all his debts and liabilities and property exempt from execution.

JOHN F. MILLER,
ALBERT W. DAVIS.

Subscribed and sworn to before me the day and year first above written.

C. S. HILL,
Clerk of said Court.

(Indorsed:) Filed Oct. 6th, 1876.

TERRITORY OF UTAH,
Salt Lake County, ss:

Third judicial district court, Hon. M. Schaeffer, judge.

IN THE MATTER OF THE CONTEST FOR A DEED for a part of lot number three, in block one hundred and four, plat "A," Salt Lake City survey, between John Gray, claimant,
and
AMOS HOWE AND ANN SMITH, CONTESTANTS.

The claimant and his counsel will take notice that the contestants appeal to the supreme court of the Territory of Utah, from the decision of the district court of the third judicial district of the Territory of Utah, entered in this action on the 30th day of October, 1875, and from the decision of said court overruling their motion for a new trial entered on the 17th day of August, 1876, and from all of the findings of said court in said suit.

October 4th, 1876.

Z. SNOW,
Attorney for Howe and Smith.

(Indorsed:) Filed and served Oct 5th, 1876.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, C. S. Hill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original statement on a motion for a new trial and
24 on appeal, and the notice of a motion to vacate the findings of court, and for a new trial, and of a motion for a new trial with the proceedings of the Court on said motion, the notice of appeal, and undertaking on appeal, in the above-entitled action, filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 20th day of October, A. D. 1876.

[L. S.] C. S. HILL, *Clerk.*

(Indorsed:) Gray *v.* Howe & Smith.

25 Afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City, on the 8th day of January, A. D. 1877, proceedings were had in said court and said cause and entered on the records of said court as follows, to wit:

THURSDAY, *January* 11*th*, A. D. 1877.

IN THE MATTER OF THE CLAIM FOR A DEED for a part of lot 3, block 104, plat A, Salt Lake City survey, between John Gray, claimant and respondent, *and* AMOS HOWE AND ANN SMITH, CONTESTANTS and appellants.	From 3d dist.

On motion of Z. Snow, esq., of appellants, the attorney of respondent consenting thereto—

Ordered, that this cause be and it is continued till the next term of this court.

26 Afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City, on the 4th day of June, A. D. 1877, proceedings were had in said court and cause and entered on the records of said court as follows, to wit:

THURSDAY, *June 7th*, A. D. 1877.

IN THE MATTER OF THE CONTEST FOR A DEED of a part of lot 3, block 104, plat A, Salt Lake City survey, between John Gray, claimant and respondent, *and* AMOS HOWE AND ANN SMITH, APPELLANTS.	From 3d dist.

This cause coming on regularly for hearing was argued by R. N. Baskin for respondent, and Z. Snow, esq., for appellants, submitted and taken under advisement by the court.

Also—

27 THURSDAY, *June* 14*th*, A. D. 1877.

IN THE MATTER OF THE CONTEST FOR A DEED of part of lot 3, block 104, plat "A," Salt Lake City survey, between John Gray, claimant & resp'd't, *and* AMOS HOWE AND ANN SMITH, APPELLANTS.	From 3d dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised, thereupon it is ordered and adjudged that the judgement of the district court herein be, and the same is hereby, reversed with costs, and the cause is remanded to said district court with direction to enter judgement in accordance with the opinion herein.

28 And on said 14th day of June, A. D. 1877, was filed in the office

of the clerk of said supreme court of Utah Territory the opinion of said court in said cause, of which and endorsements therein the following is a copy, to wit:

29 In the supreme court, Utah Territory.

IN THE MATTER OF THE APPLICATION OF JOHN GRAY ET AL. FOR LAND IN SALT LAKE CITY.

Appeal from the third district court.

The parties to this controversy are claimants for land in Salt Lake City under what is known as the "town-site acts." Gray claims the entire disputed premises. Amos Howe and Ann Smith each claim a separate and distinct portion of the premises claimed by Gray. The title was awarded to Gray. Howe and Smith appeal to this court.

The first point urged by the appellants raises the question of the right of appeal from the probate court to the district court in this class of cases. In the case of Pratt vs. Young (1st Utah, 356) this court decided that this right of appeal existed. It is difficult to conceive how it could ever have been seriously doubted.

The act of the Territorial legislature providing "rules and regulations under town-site acts" gives this right of appeal in express terms (C. L. 1169). It is in no wise dependent upon the subsequent act of Congress of June 23d, 1874, known as the "Poland bill," or the
30 rules of court adopted under it. There was no error in denying the motion to dismiss the appeal to the district court.

The next error complained of relates to the rejection of testimony offered on the hearing in the district court. A witness was placed upon the stand, and his testimony was objected to and rejected upon "the ground that it did not appear by the transcript sent up to the court that the said testimony was given at the hearing in this matter in the probate court."

The scope of the objection is that upon an appeal to the district court the case must be tried upon the testimony taken in the probate court. We do not understand this to be the construction to be given to the statute. Section 1169 of the compiled laws provides that "upon the perfection of such appeal the court shall cause the testimony and written proofs adduced, together with the statements of the parties and the judgement of the court, to be certified to the district court, to be there tried anew without pleadings except as above provided." It would simply be a review of the proceedings in the probate court, and
31 not a "trial anew," if the district court was absolutely confined to the testimony taken in the probate court. As the testimony offered was material it was error to reject it.

The testimony mentioned in the 2d exception was admissible for another reason than that mentioned above. The appellants had a right to show by testimony upon what admission of fact the case was tried in the probate court not disclosed by the transcript sent up.

The grounds upon which testimony mentioned in the 3d exception was rejected is untenable as above stated, but as the testimony itself was not material, were this the only error in the record, we should not reverse the judgement.

Another point is made upon the insufficiency of the testimony to support the findings. We think the point is well taken. The district

court found that "John Gray was in the peaceable possession of the property until 1863, when he was forcably ousted by John D. T. McAllister, and the said McAllister conveyed the property to Thomas Ellerbeck. That the other claimants thereto claimed under said
32 McAllister through said Ellerbeck, and Ellerbeck, or those to whom he transferred, have had continuous possession thereof since 1863, and still have said possession. All the testimony on the part of Gray is that he was the original owner of the whole lot of which the disputed premises form a part. That he possessed and occupied the same up to March, 1863. In his declaratory statement he describes himself as being a resident of the State of Nevada. There is no testimony to support the finding of the forcible ouster of Gray. There is no testimony from which it can be inferred even, unless it be in the recitals in the deed from McAllister to Ellerbeck. All that Gray could have then owned was a mere possessory right, which could be lost by a voluntary surrender of possession or abandonment. This deed recites a levy and sale on an execution against Gray. The judgement upon which the execution issued was unquestionably void, and this is shown by the recitals in the judgement itself. But we do not see how this can help the case of the respondent, as he has made it upon the record. It by no means follows that because there was a sale of the premises
33 on execution that there was a forcible ouster of the party in possession at the time of the sale.

At the time the respondent filed his claim he was not only not an "occupant" of the premises, but was not an inhabitant of the city, nor a resident even of the Territory. It appears that the appellants were not only "inhabitants of the city" but were the "occupants" at the time of the entry. This court held in the case of Pratt vs. Young, above referred, to "that occupancy at the time of the entry of the land by the trustee, presumptively gives the right to the occupant of the land, but that this presumption may be impeached and overthrown by proof."

This presumption arising from the continued occupancy of the premises in question by the appellant as found by the court is not impeached or overthrown by any testimony in the case.

The title to the portion of the premises claimed by each of the appellants should have been awarded to each.

The judgement of the district court is reversed with costs.

P. H. EMERSON,
Asso. Justice.

34 (Indorsed:) Supreme court, Utah Territory. In the matter of John Gray et al., applicants for city lot. Opinion of court. Filed June 14, 1877. E. T. Sprague, clerk.

35 And afterwards, at a term of said supreme court of Utah Territory begun and held *held* at Salt Lake City, on the 13th day of January, A. D. 1879, proceedings were had in said court and cause and entered on the records of said court as follows, to wit:

SATURDAY, *April* 5, A. D. 1879.

IN THE MATTER OF THE CONTEST FOR A deed of part of lot 3, block 104, plat "A," Salt Lake City survey, between John Gray, claimant & respondent,
and
AMOS HOWE AND ANN SMITH, APPELLANTS. } From 3d dist.

This day the respondent in this cause by his counsel petitioned the court for an allowance of an appeal from the final judgement, order, and decree in said cause to the Supreme Court of the United States; and this court being duly advised in the premises, and the counsel of appellants being present and consenting thereto, it is ordered and adjudged
that the respondent be and is hereby allowed such appeal, and
36 that he execute and file the bond for costs in the penal sum of
two hundred dollars, required by law, duly approved by either the chief justice or one of the associate justices of this court, within forty days.

And afterwards, on the 10th day of May, A. D. 1879, was filed in said office of the clerk of the supreme court of Utah Territory a bond
of which the following is a copy, to wit:
37 Know all men by these presents that we, John Gray, Abraham Taylor, and John C. Mather, of the city and county of Salt Lake, Utah Territory, are held and firmly bound unto Amos Howe and Ann Smith in the sum of two hundred dollars lawful money, to be paid to the said Amos Howe and John Smith, their executors or administrators, which payment, well and truly to be made, we bind ourselves and each of us, jointly, and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this the tenth day of May, A. D. 1879.

Whereas the above-named John Gray hath heretofore, on the 5th day of April, A. D. 1879, obtained in the supreme court of Utah Territory the allowance of an appeal in the case of Amos Howe and Ann Smith appellants, against the said John Gray, respondent, pending in said supreme court to the Supreme Court of the United States, to reverse the judgement rendered in said action by the said supreme court of Utah Territory against the said John Gray in favor of said appellants, Amos Howe and John Smith:

Now, therefore, the condition of this obligation is such, that if
38 the above-named John Gray shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the *shall be void otherwise the* same shall be *be* and remain in full force and virtue.

Signed, sealed, and delivered this 10th day of May, A. D. 1879, the day and year above written.

JOHN GRAY. [SEAL.]
ABRAHAM TAYLOR. [SEAL.]
JOHN C. MATHER. [SEAL.]

The above bond or obligation is approved by me, the undersigned this 10th day of May, A. D. 1879.

PHILIP H. EMERSON,
Asso. Justice, Supreme Court.

TERRITORY OF UTAH,
Salt Lake County, ss:

Abraham Taylor and John C. Mather, being duly sworn, each for himself and not one for the other upon oath says that he is worth over the sum of two hundred dollars over and above all debts and liabilities, exclusive oi property exempt from execution, that they are the parties whose names are subscribed to the within obligation as sureties.

ABRAHAM TAYLOR.
JOHN C. MATHER.

Subscribed and by said Taylor solemnly affirmed & by said Mather sworn to be true, before me, this 10th May, 1879.

[SEAL OF COURT.] E. T. SPRAGUE,
Clerk of Supreme Court, Utah Territory.

39 (Endorsed:) Filed May 10th, 1879. E. T. Sprague, clerk sup. court.

And afterwards, on the 6th day of October, A. D. 1879, was filed in the office of the clerk of the said supreme court of Utah Territory an affidavit of the value of the property in controversy, of which the following is a copy:

40 IN THE MATTER OF THE CLAIM FOR A deed of the east half of lot three, in block 104, plot A, Salt Lake City survey, between John Gray, claimant,
and
AMOS HOW AND ANN SMITH, CONTESTANTS.

THE TERRITORY of UTAH,
Salt Lake County, ss:

Abraham Taylor, being duly sworn, deposes and says that in the above matter lately pending in the supreme court of Utah Territory, and in which an appeal has been allowed to the Supreme Court of the United States, the half lot involved in said matter, to wit, the east half of lot 3, in block 104, plat A, Salt Lake City survey, is of the value of over two thousand dollars that affiant is familiar with said lot and knows the value to be more than the said two thousand dollars.

ABRAHAM TAYLOR.

Subscribed and solemnly affirmed by said Abraham Taylor to be true, before me, this 6th October, 1879.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Endorsed:) Filed Oct. 6, 1879. E. T. Sprague, clerk.

41 TERRITORY OF UTAH,
Salt Lake County, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the appeal in the cause in the attached record mentioned, herewith return to the Supreme Court of the United States a transcript of the record and proceedings in and of said supreme court of said Territory in said cause, of the opinion of said last-named court therein, of the bond on such appeal, and of an affidavit showing the

value of the property in controversy; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and affidavit is a true, full, correct, and complete copy of the several originals thereof and endorsements thereon on file or of record in my office.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory this 6th day of October, A D. 1879.

[SEAL.]

42 In the Supreme Court of the United States.

JOHN GRAY, APPELLANT, *vs.* HOW & SMITH, APPELLEES. } On appeal from the supreme court of Utah. No. 328. Oct. 7, 1881.

Whereas the clerk of the supreme court of Utah omitted sign the certificate to the transcript sent up by him in said case, it is hereby stipulated and agreed by and between the counsel of the respective parties in said case that the signature of said clerk to said certificate be and the same is hereby waived, and that the transcript so sent up shall be taken & have the same effect & force as if said omission had not occurred, saving all other questions except the one waived. Given under our hands this the 21st day of September, A. D. 1881.

R. N. BASKIN,
Of Counsel for Appellant.
Z. SNOW,
Of Counsel for Appellees.

(Indorsed:) 328. Supreme Court U. S., 1881, October term. No. 328. John Gray, app'l't, vs. Amos Howe et al. Stipulation waiving signature to clerk's certificate to transcript. Filed 10th Oct'r, 1881. Office Supreme Court U. S. Filed Oct. 10, 1881. James H. McKenney, clerk.

(Indorsement on cover:) No. 328. John Gray, appellant, vs. Amos Howe and Ann Smith. Utah Terr'y sup. court. Filed 13th October, 1879.

106-12

OFFICE SUPREME COURT U.S.
FILED
APR 27 1882
JAMES H. McKENNEY

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

JOHN GRAY,
Appellant,
vs.
AMOS HOWE and
ANN SMITH.

APPELLANT'S BRIEF.

R. N. BASKIN,
For Appellant.

Z. SNOW,
For Defendants.

value of the property in controversy; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and affidavit is a true, full, correct, and complete copy of the several originals thereof and endorsements thereon on file or of record in my office.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory this 6th day of October, A. D. 1879.

[SEAL.]

42 In the Supreme Court of the United States.

JOHN GRAY, APPELLANT,
vs.
HOW & SMITH, APPELLEES. } On appeal from the supreme court of Utah. No. 328. Oct. 7, 1881.

Whereas the clerk of the supreme court of Utah omitted sign the certificate to the transcript sent up by him in said case, it is hereby stipulated and agreed by and between the counsel of the respective parties in said case that the signature of said clerk to said certificate be and the same is hereby waived, and that the transcript so sent up shall be taken & have the same effect & force as if said omission had not occurred, saving all other questions except the one waived. Given under our hands this the 21st day of September, A. D. 1881.

R. N. BASKIN,
Of Counsel for Appellant.
Z. SNOW,
Of Counsel for Appellees.

(Indorsed:) 328. Supreme Court U. S., 1881, October term. No. 328. John Gray, app'l't, vs. Amos Howe et al. Stipulation waiving signature to clerk's certificate to transcript. Filed 10th Oct'r, 1881. Office Supreme Court U. S. Filed Oct. 10, 1881. James H. McKenney, clerk.

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108-12

OFFICE SUPREME COURT U.S.
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IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

JOHN GRAY,
Appellant,
vs.
AMOS HOWE and
ANN SMITH.

APPELLANT'S BRIEF.

R. N. Baskin,
For Appellant.

Z. Snow,
For Defendants.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

JOHN GRAY,
Appellant,
vs.
AMOS HOWE and
ANN SMITH.

R. N. BASKIN,
For Appellant.

Z. SNOW,
For Defendants.

APPELLANT'S BRIEF.

The point presented to this Court on the appeal, and upon which the Appellant rests his case, is: Does the evidence entitle him to deeds of the disputed premises.

John Gray's original filing covered the whole of Lot 3, Block 104. See page 2 of Record.

This filing, by leave of Court, was amended so as to

relinquish the west half of said lot, (p 3 of Record,) so that the east half thereof is the premises claimed by him and in dispute.

The portions of the same severally claimed by defendants are set out in their respective statements. Page 2 of Record.

John Gray, the Appellant, was the original owner and occupant of the disputed premises and remained in possession up to March, 1863. Page 4 of Record.

The defendants claim title from Gray, by virtue of a sale of said premises by the marshal, on an execution against Gray, and a chain of conveyances from said marshal to the Defendants and possession. See Defendants' Brief, p. 3, and Record p. 8 and 9. There is no evidence tending to show that Howe was ever in possession.

The recitals in the marshal's deeds and the statement of Defendants' counsel, p.8, in connection with the recognizance, forfeiture of the same, the entry of judgment and the order of execution, p. 9, show that the sale of said premises by the marshal was based upon said recognizance, forfeiture, judgment and an execution issued under said order. That such was the case is not disputed. By the introduction of the foregoing chain of title and said records the Defendants admit that John Gray was, at the date of the marshal's sale, the rightful owner and occupant of said premises, and seeks to defeat him in this action on the ground that his rights were passed to said Defendants by said proceedings and said conveyances.

As, therefore, the Defendants claim through John Gray it follows that if said sale was void, the said Gray has not been divested of his rights and that fact being made to appear to this Court, he should be protected in his rights and lose nothing by the illegal proceedings against him. The question thus presented is quite different from the one decided by this Court in the cases referred to at the end of the Defendants' Brief.

The doctrine of *caveat emptor* applies to judicial sales and a sale under a void judgment passes no title.

Gray *vs.* Haws, 8 Cal., 562.

13 Smead & Marshal, 145.

The proceedings and judgment against the Appellant on which the premises were sold were void. First, because it appears from the record that default aud judgment was entered on the day that the parties were required, by the recognizance, to appear No scirefacias was previously issued or action brought, but on the same day that the judgment was rendered execution issued. The Appellant never had his day in court.

A scirefacias should have been, first, issued.

2 Bouv's Law Dict. and cases cited.
Pincard *vs.* The State, 2 Ills. 187.
(1 Scam.) People *vs.* Witt, 19 Ills. 171.

Second, Because the recognizance did not recite the cause of the caption.

1 Archb's Crim. Prac. p. 57 and cases cited.
Commonwealth *vs.* Daggett, 16 Mass. 448,
(Side p.)
Commonwealth *vs.* Downey, 9 Mass. 520.
State *vs.* Smith, 2 Greenl. 61.
State *vs.* Brown, 41 Me. 535.

Third, The recognizance failed to show that a complaint was made against the parties, or that they were brought before the Judge in Chambers, or that an offense had been committed, and that there was probable ground to believe the persons accused guilty.

State *vs.* Hartwell, 35 Me. 129.

The ninety persons referred to in the recognizance were the survivors of the Morrisite massacre. The terms of the recognizance is a novelty: it binds each of the ninety for the other, in $1,500 each, and the judgment is against all for $34,500, for this reason the judgment is void upon its face.

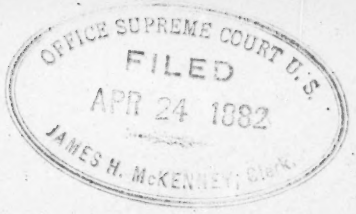
The said proceedings being therefore void, ~~Appellants~~ defendants took nothing by virtue of the same and can not avail themselves of a possession which had its origin in wrong.

On the question of jurisdiction it is sufficient to say that the appeal was allowed and bond given by consent of Defendants' counsel, (See Rec. 18,) within two years from the rendition of judgment.

On the subject of appeals from the Supreme Court of Utah Territory to this Court see Secs. 1909, 1008, U.S. Rev. Stat.

Respectfully Submitted,
R. N. BASKIN,
Counsel for Appellant.

108-12



Supreme Court of the United States.

OCTOBER TERM,
1881.

JOHN GRAY,
APPELLANT,
vs.
No. 328,
AMOS HOWE AND ANN GRAY.

DEFENDANTS' BRIEF.

R. N. BASKIN,
FOR APPELLANT.

Z. SNOW,
FOR DEFTS.

On the question of jurisdiction it is sufficient to say that the appeal was allowed and bond given by consent of Defendants' counsel, (See Rec. 18,) within two years from the rendition of judgment.

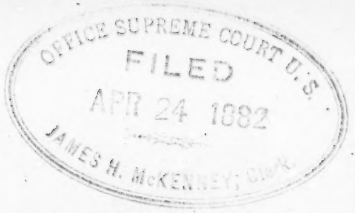
On the subject of appeals from the Supreme Court of Utah Territory to this Court see Secs. 1909, 1008, U.S. Rev. Stat.

Respectfully Submitted,

R. N. BASKIN,

Counsel for Appellant.

108-12



Supreme Court of the United States.

OCTOBER TERM,
1881.

JOHN GRAY,
APPELLANT,
vs.
No. 328,
AMOS HOWE AND ANN GRAY.

DEFENDANTS' BRIEF.

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This Court has not jurisdiction in this case, for the reason that the judgment of the Supreme Court was rendered June 14, 1877.

Printed Record, 15.

No allowance of an appeal was made till April 5, 1879, near two years.

Printed Record, 18.

No bond filed till May 10, 1879, and no citation issued.

National Bank vs. Omaha, 96 U. S., Otto 6, 737.

Sage vs. Railroad, 60, 96 U. S., 715.

But, if in this the Court differs with us, then we say there was no error in the proceeding of the Probate Court, nor in the Supreme Court of the Territory, as the following abstract will show:

ABSTRACT OF THE CASE.

This is a contest for a deed of land under what is familiarly called the townsite acts.

The land in controversy is a part of Salt Lake City

survey, being *the east half* of Lot 3, Block 104, Plat A, of said city, in Salt Lake County. It was declared upon by Daniel H. Wells, Mayor of said city, on the 4th day of November, 1871, pursuant to the act of Congress, entitled, "An Act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2d, 1867, and pursuant to the act of the Governor and Legislative Assembly of the Territory of Utah, approved February 11, 1869, entitled, "An Act prescribing rules and regulations for the execution of the trust arising under an act of Congress, entitled, 'An Act for the relief of inhabitants of cities and towns upon the public lands,' approved March 2d, 1867."

That the notice required by the act last aforesaid, section two, was given November 27th, 1871, to claimants to file with the Probate Court their "*Statements.*" And a patent was issued by the United States, January 1st, 1872, to said Daniel H. Wells, as provided by law, for said land, among other lands.

Each of the parties filed its claim with the Probate Court in due time and in due form.

John Gray claimed the whole of the east half of said lot.

See Printed Record, 2 and 3.

Amos Howe claimed the following part of *the east half*, to wit: Commencing two rods west of the southeast corner of Lot 3, thence north twenty rods, thence west three rods and five feet, thence south twenty rods, thence east three rods and five feet to the place of beginning, in Block 104, Plat "A," in the city of Salt Lake, Territory of Utah, containing sixty-six square rods, more or less.

Ann Smith claimed two rods south front by twenty rods north, off of the *east half of Lot* 3, in Block 104, Plat "A."

See Printed Record, 2.

The Probate Court, on the 3d day of September, 1872, issued a summons to the said John Gray, Amos Howe and Ann Smith, to appear before said Probate Court, at the Court House in said county, on the 14th day of September, 1872, to make proof of said claim, which said summons was duly served and returned; and on the 14th day of September, 1872, the parties by themselves and their counsel appeared in court.

Case continued till September 22, 2 p.m.

See Printed Record, 3.

RECORD.

September 22, 2 p.m.

Parties present. By agreement, the evidence on the part of John Gray was first taken up.

Counsel for John Gray asked leave to introduce in evidence that part of the records of Salt Lake County known as Sheet five (5), showing that John Gray was the original owner of Lot number three (3), in Block number one hundred and four (104), Plat "A," Salt Lake City survey.

Counsel for Ann Smith and Amos Howe admitted Sheet 5 to be the original entries of Salt Lake City survey; also that the said John Gray was in possession and occupation of said lot up to March, 1863.

Counsel for John Gray here rested.

The foregoing is all the testimony introduced by him on either trial.

See Printed Record, 4.

This statement to the Court, showed that at the time of filing it he was a resident of the State of Nevada.

See ‡ Printed Record, 2, 17.

On the part of Amos Howe and Ann Smith, the testimony was, records of the Recorder's Office and of the District Court, showing a sale of the lot, by the marshal, on an execution issued against John Gray and others, by the District Court, in March, 1863. Thomas Ellerbeck being the purchaser, and sundry deeds from him till they reached Howe and Smith, accompanied with possession of the lot by them, from March, 1863, till the time of the hearing, and improvements made thereon.

See Printed Record, 4, 5.

THE PROBATE COURT FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

February 2d, 1874.

TITLE.

This case came up for hearing in the Probate Court for Salt Lake County, Territory of Utah, upon the several applications on file herein. Having been adjourned from time to time for the introduction of testimony, the case was finally submitted, and upon investigation thereof, the evidence adduced and allegations of the parties, the Court finds the following, to wit:

That Amos Howe is the rightful owner of the following described piece or parcel of land, to wit: Commencing at a point two rods west from the southeast corner of said Lot 3, Block 104, Plat "A," and running thence north 20 rods; thence west 3 rods, 1 foot, 8½ inches; thence south 20 rods, to a point 3 rods, 5 feet, 8½ inches west of the place of beginning; thence east to the place of beginning. That Ann Smith is the rightful owner of the following described piece or parcel of land, to wit: Commencing at the southeast corner of said lot; thence north 20 rods; thence west 2 rods; thence south 20 rods; thence east 2 rods to the place of beginning. That said John Gray is not the rightful owner of the land claimed and described in his application, Nos. 3,191 and 3,026.

It is further ordered that a certificate of title issue in accordance herewith.

Dated Feb. 2d, 1874.

E. Smith,
Judge of said Court.

From this judgment, Gray appealed to the District Court. An unsuccessful effort was made to dismiss the appeal, and, therefore, a trial was had in the District Court.

This case came on for trial before the Court, the trial before the jury being waived, on the 26th day of October, 1875, when the three following exceptions to the rulings of the Court were taken by the counsel for Amos Howe, which exceptions were each respectively signed and sealed by the Court, and ordered to be made a part of the record in this matter.

Exception I.

TITLE.

Be it remembered that on the trial of this case before the Court, on the 26th day of October, 1875, Amos Howe, by his counsel to maintain the issue on his part, presented himself as a witness, and offered to prove by himself, that he, the said Amos Howe, on the 8th day of May, 1865, after receiving a deed of conveyance from George Nebeker of that part of said lot by him claimed, entered into the possession thereof, and that he had continuously from the said 8th day of May, been in the actual occupancy of the same up to the present time, and has made valuable improvements thereon.

To this the said John Gray, by his counsel, objected,

on the ground that it did not appear by the transcript sent up to the Court that said testimony was given at the hearing in this matter in the Probate Court, and the Court sustained said objection, and would not permit said evidence to be given. To this ruling the said Howe then and there excepted.

Exception II.

Afterward, the said Amos Howe offered to prove by the said Howe, to be followed by other witnesses, that in the Probate Court of said county, on the 22d day of September, 1872, when the testimony was being taken in this matter in said Court, he offered himself as a witness, and offered to prove by himself that on the 8th day of May, 1865, after receiving a deed of conveyance from George Nebeker of the land claimed by him in this matter, entered itno the possession of the same, and had continued in such possession up to the said 22d day of September, 1872, and made valuable improvements thereon, but that at that time, before said Court, the said John Gray, by his counsel, admitted that such were the facts, and for that reason said testimony was not given in said Probate Court. To which the said John Gray, by his counsel, objected, on the ground that it did not affirmatively appear by the transcript sent up, that this was the fact, and that such in fact was not the case. And the Court sustained said objection and would not permit said testimony to be given. To which said Amos Howe, by his counsel, then and there excepted.

Exception III.

The said Amos Howe then presented upon the stand as a witness on his part, One Elias Smith, and offered to prove by him that at the time of making out the transcript in this case to be presented to this Court, the copy of an execution referred to in Patrick Lynch's testimony was not among the papers in the clerk's office of the Probate Court, and for that reason the said copy was not included in the transcript in this case; and that he, as Deputy Clerk of the Probate Court, had made due and diligent search for the same, at the instance of the counsel for Amos Howe, but that it could not be found.

That his object in introducing said testimony, was to follow it with other testimony, showing its loss, and showing that an execution issued on the 14th day of March,

1863, on the judgment of this Court, entered on the 13th day of March, 1863, and levied on the property now in dispute as the property of John Gray, and that said property had been sold by virtue of said execution to Thomas Ellerbeck, as stated in the deed of John D. T. McAllister to Thomas Ellerbeck.

To which the said John Gray, by his counsel, objected, on the ground as alleged, that it did not affirmatively appear that said copy was offered in evidence in the Probate Court. And the Court sustained said objection, and would not permit said testimony to be given.

To which the said Amos Howe, by his counsel, then and there excepted.

See Printed Record, 7.

Then followed all the testimony in the case given in the District Court, which, on the part of Gray, has been before stated, and on the part of Howe and Smith is, as before said, records of courts, showing a sale, on an execution, and sundry conveyances from the purchaser to Howe and Smith.

See Printed Record, 8, 9.

Then requests were made to the Court to find certain facts and conclusions of law in behalf of Howe and Smith, which were refused.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT OF THE DISTRICT COURT.

Findings of the District Court.

Filed October 30th, 1875.

TITLE.

The Court finds the following facts:

John Gray was in the peaceable possession of the property until 1863, when he was forcibly ousted by John D. T. McAllister, and the said McAllister conveyed the property to Thomas Ellerbeck. That the other claimants thereto claimed under said McAllister through said Ellerbeck, and Ellerbeck, or those to whom he transferred, have had continuous possession thereof since 1863, and still have said possession.

That said John Gray and others were, in 1863, held in

recognizance in the Third District Court to appear therein and answer any indictment which the grand jury might find against them. That a forfeiture of said recognizance was taken before any action of the grand jury, and that the grand jury afterward did act and find an indictment, which the defendants answered, and upon which they were tried, found guilty, sentenced, and then by the Governor, S. S. Harding, pardoned.

That as conclusions of law the Court finds;

That the forfeiture of the recognizance was *premature* and *void* for want of jurisdiction of the parties by the Court.

That the Court could only forfeit said recognizance after indictment found and failure of defendants to answer thereto.

That said Gray was forcibly, unlawfully, and wrongfully ousted, and a trespasser can gain no advantage by unlawful acts.

J. S. BOREMAN, Judge.

See † Printed Record, 8, 9, 10.

To this exceptions were taken (See † Printed Record, 10, 11), and a motion made to vacate the findings of fact and for a new trial, which is as follows:

TITLE OF CASE.

The above named John Gray and his counsel, will take notice that the aboven amed Ann Smith and Amos Howe will move the Court to vacate the findings of fact by the Court and its decision herein filed on the 30th of October, 1875, and for a new trial, for the following causes materially affecting the substantial rights of them, the said Ann Smith and Amos Howe.

1. The insufficiency of the evidence to justify findings of facts.
2. The decision is against the evidence and contrary to law.
3. The Court erred in overruling the motion to dismiss the appeal in this matter.
4. The Court erred in holding that no evidence could be introduced on the trial in this matter, except the evidence given in the Probate Court, and therefore erred i refusing to permit the said Amos Howe to prove that h

went into possession of so much of said lot as is claimed by him, on the 8th day of May, 1865, and that he continued therein from that date till the present time, and that he had made valuable improvements thereon.

5. Or, if the Court did not err as in item 4 of this notice, then the Court erred in not permitting the said Amos Howe to prove that he, on the trial in the Court below, offered to make said proof, and the facts were admitted by the counsel of said John Gray, and for that reason, such proof was not there made.

6. The Court erred in not permitting the said Amos Howe to prove and show the loss of the copy of an execution issued on March 14th, 1863, offered in the testimony of Patrick Lynch, and in not permitting him to show the contents of said execution by parol.

7. That by law, a purchaser by virtue of an execution, and those claiming under him, are freely protected on showing a judgment of a court of competent jurisdiction, against the judgment debtor, an execution issued thereon, and a levy and sale. Irregularities in any of them do not affect him.

8. The persons in possession of the property at the time the Mayor declared upon the land, *bona fide* claiming title thereto, are the persons to whom the deed must be given. Any latent equities therein must be settled in a court of equity after the legal title passes.

Z. SNOW,
Attorney for Smith and Howe.

Indorsed, filed and served Nov. 4th, 1875.

See Printed Record, 11, 12.

This motion was made and overruled by the Court.

See Printed Record, 12, 13.

An appeal took the case to the Supreme Court of the Territory, where the judgment of the District Court was reversed, and the judgment of the Probate Court affirmed.

See Printed Record, 15, 16.

There was no formal findings of fact or conclusions of law filed by the Supreme Court, but its judgment and opinion is in the Printed Record, p. 15 and 16, to which the attention of this Court is called. An attempted appeal brings the case to this Court.

There is no error in the judgment of the Supreme Court of the Territory.

The facts condensed, as appear from the record, are these:

Gray, from about 1851, till March 1863, was the rightful occupant of the whole lot. At this date his interest therein was sold on execution, and the purchaser entered into possession thereof. Gray, on the sale being effected, abandoned the lot.

He was never again possessed thereof.

Howe and Smith, by conveyances to them, had been in possession eight years before the filing of the several statements.

This brings the case clearly within the act of Congress, the act of Utah, and the following decisions of this Court:

Folsom vs. Dewey, 103, U. S., 738.
Stringfellow vs. Cain, 99, U. S., 610.
Cannon vs. Pratt, Id. 619.
Hussey vs. Smith, Id. 20.
Cofield vs. McLelland, 16 Wall, 331.

And we think no more need be said.

Z. SNOW,
Solicitor for Howe and Smith.